



EX PARTIAL OR LATE FILED

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May 14, 1997

RECEIVED

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Federal Communications Commission
Office of Secretary

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: *Ex Parte* Submission
Implementation of Section 255 of the Telecommunications Act of 1996
WT Docket No. 96-198

Dear Mr. Caton:

Enclosed for filing, on behalf of SBC Communications Inc. and Pacific Telesis Corporation, is an original and one copy of an *ex parte* communication in the above-referenced docket. This submission responds to a question raised during recent meetings with the Commission and provides an analysis of the Commission's authority over manufacturers under Section 255 of the Communications Act, as amended. Please date stamp and return the enclosed duplicate copy.

Should there be any questions about this matter, please contact the undersigned.

Sincerely,

Gina Harrison

Encl.

cc: Jackie Chorney, Office of Chairman Hundt
Suzanne Toller, Office of Commissioner Chong
Dan Phythyon, Chief, Wireless Telecommunications Bureau
Elizabeth Lyle, Senior Legal Advisor, WTB
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Mr. William F. Caton
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Commission's Statutory Authority Under Section 255 of the
Communications Act, As Amended, WT Docket No. 96-198

Dear Mr. Caton:

At the request of SBC Communications Inc. and Pacific Telesis Corporation, this letter provides a brief analysis of the Federal Communications Commission's ("FCC's") statutory authority over equipment manufacturers under Section 255 of the Communications Act. As discussed below, we conclude that: (i) the FCC has broad discretion to implement Section 255 either through adjudication or rulemaking, (ii) the guidelines issued by the Architectural Transportation and Barriers Compliance Board ("Access Board") are intended to be a starting point for FCC regulations, and (iii) the clause of Section 255 providing exclusive jurisdiction to the FCC to enforce complaints under Section 255 was intended as a limit on potential plaintiff's choices of forum rather than as a limit on the Commission's authority to create rules.

Section 1 of the Communications Act vests in the FCC the authority to "execute and enforce the provisions of this Act." 47 U.S.C. § 151. Thus, the FCC's authority under Section 255(b) extends to executing and enforcing the requirement that "[a] manufacturer of telecommunications equipment or customer premises equipment . . . ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable." 47 U.S.C. § 255(b). The FCC is also charged with enforcing the requirement that, if the mandate of Section 255(b) is not readily achievable, the "manufacturer . . . ensure that the equipment . . . is compatible with existing peripheral devices or specialized customer premises equipment commonly used by individuals with disabilities to achieve access, if readily achievable." 47 U.S.C. § 255(c). Thus, Section 255 explicitly grants the FCC jurisdiction over manufacturers to ensure disability access goals are met.

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Under Section 4(i) of the Communications Act, the Commission has the authority to "make such rules and regulations . . . not inconsistent with this Act, as may be necessary in the execution of its functions."¹ 47 U.S.C. § 154(i). In discharging this responsibility, as a general principle of administrative law, "[t]he Commission has substantial discretion as to whether to proceed by rulemaking or adjudication."² As discussed below, this discretion has not been constrained by Section 255(e), which states that "the [Access Board] shall develop [accessibility and use] guidelines . . . *in conjunction with the Commission*" nor by Section 255(f), which grants the Commission exclusive jurisdiction "with respect to *any complaint* under this section." 47 U.S.C. § 255(e-f).

Indeed, the legislative history of Section 255 indicates that Congress fully intended for the FCC to implement regulations under Section 255. The Conference Report accompanying the legislation states that "[t]he remedies available under the Communications Act, *including* the provisions of Section 207 and 208, are available to enforce compliance with the provisions of section 255."³ The complaint procedures under Sections 207 and 208, therefore, are not intended to be the exclusive means for enforcing Section 255. The Senate Report, in explaining Section 262(e) of the original bill, which ultimately tracks the language of Section 255(f), is even more clear and states "[t]he Committee has elsewhere assigned *responsibility for promulgating regulations for this new section to the Commission*," and that "[t]he Committee envisions that the

¹ See also Specialized Common Carrier Services In The Domestic Public Point-To-Point Microwave Radio Service, 29 F.C.C.2d 870 (1971) ("the general rule making power of the Commission is not limited to specific statutory authorizations, but extends to matters "not inconsistent with the act or law.") (citing *United States v. Storer Broadcasting Co.*, 351 U.S. at 202).

² See, e.g., *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 98 S. Ct. 2096, 56 L. Ed. 697 (1978) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 201-202 (1947) ("the choice between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.")); *Media Access Project, et al. v. F.C.C.*, 883 F.2d 1063 (D.C. Cir. 1989); *Interdependence Of Computer And Communication Services And Facilities*, 28 F.C.C.2d 267 (1971) (stating "This Commission is . . . not constrained to await the actual occurrence of evils we foresee and to take action to correct or punish through an adjudicatory proceeding. Rather, we may act instead to prevent such evils by formulating and adopting rules of general applicability with respect to anticipated improprieties."); *Rates for Competitive Common Carrier Services*, 84 F.C.C.2d 445 (1981) ("We are clearly free to choose between general rules designed to prohibit abuses before they occur, and adjudicatory forums which will monitor abuses on the basis of complaints received.").

³ H. R. Conf. Rep. 104-458, 104th Cong., 2d Sess. at 135 (emphasis added).

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guidelines developed by the Board will serve as the starting point *for regulatory action by the Commission*."⁴ We note that the statutory scheme is analogous to other instances where the FCC has shared with other agencies responsibility for developing a regulatory scheme without abrogating its ability to implement its own regulations that interpret other agencies' actions.⁵

Based upon the legislative history of Section 255, the statement that the FCC has sole jurisdiction to enforce complaints under Section 255 must be read as a limitation on plaintiff's ability to "forum shop," rather than as a limitation on the FCC's ability to draft regulations. In effect, Congress wanted to "mandate[] that all remedies are available only through the Communications Act," and ensure that "[n]o [a]dditional [p]rivate [r]ights [are] [a]uthorized." 47 U.S.C. § 255(e). Moreover, the subsection itself states that the section shall not be construed to authorize any private right of action "to enforce any requirement of this section or any *regulation* thereunder." As the Access Board is empowered only to draft guidelines, the subsection thus implicitly supports the FCC's authority to create regulations.

In conclusion, Section 255 empowers the Commission to enforce the manufacturing provisions on disability access either through rulemaking, adjudication, or a combination of both.

⁴ Sen. Conf. Rep. 104-23, 104th Cong., 1st Sess. at 53; *see also id.* (discussing Section 262(b), which eventually became Section 255(b), and stating that "[t]he Committee intends this requirement to apply prospectively to such new equipment manufactured after the date for *promulgation of regulations by the Commission*").

⁵ *See, e.g., Media Access Project v. F.C.C.*, 883 F.2d 1063 (D.C. Cir. 1989) (discussing FCC implementation of OMB guidelines for FOIA fees); Revision of Part 17 of the Rules Concerning Construction, Marking, and of Antenna Structures, 11 FCC Rcd 4272 (1995) (discussing relationship between FCC and FAA regulations governing the marking and lighting of antenna structures).

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Based upon the legislative history of Section 255 and general principles of administrative law, the limiting clauses in Section 255 should not be interpreted as constraints on the Commission's rulemaking authority.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric W. DeSilva". The signature is fluid and cursive, with the first name "Eric" being more prominent.

Eric W. DeSilva